



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
Phone 800-227-8917
<http://www.epa.gov/region08>

July 11, 2003

Ref: 8ENF-T

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

The Corporation Company
Registered Agent for Target Corporation
1675 Broadway
Denver, CO 80202

Thomas J. Roche
Registered Agent for Roche Constructors, Inc.
361 71st Avenue
Greeley, CO 80634

Re: Notice of Proposed Assessment of Civil Penalty
Docket No. **CWA-08-2003-0076**
Facility Permit No. COR-032714

Dear Registered Agents:

Enclosed is a document entitled Penalty Complaint and Notice of Opportunity for Hearing ("Complaint"). The United States Environmental Protection Agency ("EPA") is issuing this Complaint against Target Corporation and Roche Constructors, Inc. ("Respondents") pursuant to section 309 of the Clean Water Act ("Act"), 33 U.S.C. § 1319. In the Complaint, EPA alleges that Respondents have violated section 301(a) of the Act, 33 U.S.C. § 1311(a), and its implementing regulations, specifically 40 C.F.R. part 122 for failure to obtain the required storm water permit from the State of Colorado. The Complaint proposes that a penalty of \$80,000 be assessed against Respondents for this violation.

You have the right to a hearing to contest the factual allegations in the Complaint or the appropriateness of the proposed penalty. We have enclosed a copy of 40 C.F.R. part 22, which identifies the procedures EPA follows in administrative civil penalty assessments.

If you wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, you must file an answer within thirty (30) days of your receipt of the enclosed Complaint to the EPA Region VIII Hearing Clerk at the following address:

Regional Hearing Clerk (8RC)
U.S. EPA, Region VIII
999 18th Street, Suite 300
Denver, Colorado 80202-2466



Printed on Recycled Paper

If you do not file an answer within 30 days [see 40 C.F.R. § 22.15(d)], you may be found in default. A default judgment may impose the full penalty proposed in the Complaint of \$80,000.

EPA encourages the consideration of Supplemental Environmental Projects (SEPs) in conjunction with civil penalties, in the settlement of civil enforcement cases. In case you are interested in this possibility, we have enclosed a copy of the EPA policy that describes the possibilities and limitations of SEPs in such matters. An agreement to perform a SEP may result in a lower cash penalty amount.

EPA encourages settlement of these proceedings at any time prior to a formal hearing if the settlement is consistent with the provisions and objectives of the Act and applicable regulations (See 40 C.F.R. § 22.18). If a mutually satisfactory settlement can be reached, it will be formalized in a consent agreement signed by you and the delegated authority for EPA. Upon final approval of the consent agreement by the Regional Judicial Officer, Respondents will be bound by the terms of the consent agreement and will waive their right to a hearing on, and judicial appeal of, the agreed upon civil penalty. You have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA.

A Small Business Regulatory Enforcement and Fairness Act (SBREFA) information sheet, containing information on compliance assistance resources and tools available to small businesses, is enclosed with this letter. SBREFA does not eliminate your responsibility to comply with the Act and respond to this Complaint, nor does it create any new rights or defenses under law.

If you have any questions regarding this letter, the enclosed Complaint, or any other matters pertinent to Respondents' compliance with the Act, the most knowledgeable people on my staff regarding these matters are Lee Hanley, Technical Enforcement, at (303) 312-6555 or David J. Janik, Supervisory Enforcement Attorney, at (303) 312-6917. If you are represented by an attorney, or to request a settlement conference, please call Mr. Janik. Please note that arranging for a settlement meeting does not relieve you of the need to file a timely answer to EPA's Complaint.

Sincerely,

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures:

1. Penalty Complaint and Notice of Opportunity for Hearing
2. Consolidated Rules of Practice (40 C.F.R. Part 22)
3. Supplemental Environmental Projects Policy
4. Small Business Regulatory Enforcement and Fairness Act Information
5. Memo from CDPHE

cc: Tina Artemis, Regional Hearing Clerk
Mark Pifher, CDPHE

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

Docket No. **CWA-08-2003-0076**

In the Matter of:)	
)	
Target Corporation,)	PENALTY COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING
a Minnesota Corporation,)	
)	
Roche Constructors, Inc.)	
a Colorado Corporation,)	
)	
Respondents.)	

INTRODUCTION

1. This civil administrative enforcement action is authorized by Congress in section 309(g) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA or the Act). 33 U.S.C. § 1319(g). The Environmental Protection Agency (EPA) regulations authorized by the statute are set out in part 122 of title 40 of the Code of Federal Regulations (C.F.R.), and violations of the statute, permits or EPA regulations constitute violations of that section of the Act. The rules for this proceeding are the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits (“Rules of Practice”),” 40 C.F.R. part 22, a copy of which is enclosed.

2. The undersigned EPA official has been properly delegated the authority to issue this action. EPA has consulted with the State as required by the Act. 33 U.S.C. § 1319(g)(1).

3. EPA alleges that Respondents have violated the Act, permit and/or regulations and proposes the assessment of a civil penalty, as more fully explained below.

NOTICE OF OPPORTUNITY FOR A HEARING

4. Respondents have the right to a public hearing before an administrative law judge to disagree with (1) any act stated (alleged) by EPA in the complaint, (2) the grounds for any legal defense, or (3) the appropriateness of the proposed penalty.

5. To disagree with the complaint and assert your right to a hearing, Respondents must file a written answer (and one copy) with the Regional Hearing Clerk (999 18th Street; Suite 300 (8RC); Denver, Colorado 80202) within 30 days of receiving this complaint. The answer must clearly admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the Rules of Practice for a complete description of what must be in the answer.

1 **FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS**
2 **MAY WAIVE RESPONDENTS' RIGHT TO DISAGREE WITH THE ALLEGATIONS**
3 **OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND**
4 **ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT, OR UP TO**
5 **THE MAXIMUM AUTHORIZED BY THE ACT.**

6 7 **QUICK RESOLUTION**

8
9 6. Respondents may resolve this proceeding at any time by paying the penalty amount
10 proposed in the complaint. Such payment need not contain any response to, or admission of, the
11 allegations in the complaint. Such payment constitutes a waiver of Respondents' right to contest
12 the allegations and to appeal the final order. See section 22.18 of the Rules of Practice for a full
13 explanation of the quick resolution process.

14 15 **SETTLEMENT NEGOTIATIONS**

16
17 7. EPA encourages discussing whether cases can be settled through informal settlement
18 conferences. If you want to pursue the possibility of settling this matter, or have any other
19 questions, contact David J. Janik, Supervisory Enforcement Attorney, at [1-800-227-8917 ;
20 extension 6917 or 303-312-6917] or the address below. **Please note that calling the attorney**
21 **or requesting a settlement conference does NOT delay the running of the 30 day period for**
22 **filing an answer and requesting a hearing.**

23 24 **GENERAL ALLEGATIONS**

25
26 The following general allegations apply to all times relevant to this action, and to each
27 count of this complaint:

28
29 8. In order to restore and maintain the integrity of the nation's water, section 301(a) of
30 the Act prohibits the discharge of pollutants into navigable waters of the United States, unless it
31 is in compliance with a permit issued pursuant to the Act. 33 U.S.C. § 1311(a).

32
33 9. Section 402 of the Act establishes a National Pollutant Discharge Elimination System
34 (NPDES) program, administered by EPA or State, to permit discharges into navigable waters,
35 subject to specific terms and conditions. 33 U.S.C. § 1342.

36
37 10. The Act requires that a discharge of storm water associated with an industrial activity
38 to navigable waters must comply with the requirements of an NPDES permit.
39 33 U.S.C. § 1342(p).

1 11. The Act authorized, and EPA issued, regulations that further define requirements for
2 NPDES permits for storm water discharges. 33 U.S.C. § 1318, § 1342(p). The regulations are
3 found at 40 C.F.R. part 122.

4
5 12. EPA regulations define discharges associated with industrial activity to include
6 construction activity. 40 C.F.R. § 122.26(b)(14)(x).

7
8 13. EPA regulations require each person who discharges storm water associated with
9 industrial activity to either apply for an individual permit or seek coverage under an existing and
10 lawful general permit. 40 C.F.R. § 122.26(c).

11
12 14. The State of Colorado has lawfully issued a general permit, under the authority of
13 State law and the Act, which authorizes the discharge of storm water associated with
14 construction activities, if done in compliance with the conditions of the permit. Respondents had
15 assumed their construction activities were covered under the permit held by the Aurora Town
16 Center's developer. Respondents failed to obtain the required permit from the State of
17 Colorado, Colorado permit no. COR-030000; attached as exhibit A ("permit").

18
19 15. The permit requires, among other things, that a person discharging pollutants develop
20 and implement an adequate storm water management plan (SWMP), conduct regular specified
21 storm water inspections, and implement best management practices ("BMPs"), etc. BMPs
22 include structural controls (such as sediment ponds and silt fences) and management practices
23 (such as a dedicated concrete washout area and street sweeping).

24
25 16. Respondent (Target Corporation) is a corporation, incorporated in the State of
26 Minnesota, and doing business in the State of Colorado.

27
28 17. Respondent (Roche Constructors, Inc.) is a corporation, incorporated in the State of
29 Colorado, and doing business in the State of Colorado.

30
31 18. Respondents are "persons" within the meaning of section 502(5) of the Act, and
32 therefore subject to the requirements of the statute and/or regulations. 33 U.S.C. § 1362(5).

33
34 19. Respondents own or were engaged in construction activities at a facility located at
35 14300 E. Ellsworth, Aurora, CO ("facility").

36
37 20. Respondents engaged in construction activities at the facility at all times relevant to
38 this action.

39
40 21. Respondents are therefore engaged in an "industrial activity" as defined by EPA
41 regulations. 40 C.F.R. § 122.26(b)(14).

42
43 22. Storm water, snow melt, surface drainage and run off water leaves Respondents'
44 facility and goes into the Aurora municipal separate storm sewer system (MS4).

45
46 23. The run off and drainage from Respondents' facility is "storm water" as defined by

1 EPA regulations. 40 C.F.R. § 122.26(b)(13).
2

3 24. Storm water contains “pollutants” as defined by the Act. 33 U.S.C. § 1362(6).
4

5 25. The Aurora MS4 drains to West Tollgate Creek which is “navigable water” and
6 “waters of the United States,” as defined by the Act and EPA regulations, respectively. 33
7 U.S.C. § 1362(7); 40 C.F.R. § 122.2.
8

9 26. Respondents’ storm water runoff is the “discharge of a pollutant” as defined by EPA
10 regulations. 40 C.F.R. § 122.(b)(14)(x).
11

12 27. An authorized EPA employee entered the facility with the consent of Respondent
13 (Roche Constructors, Inc.) on October 4, 2002 to inspect it for compliance with the statute,
14 permit and regulations. The counts below outline violations confirmed by the inspector.
15

16 28. Construction activities, which were part of a larger common development plan,
17 commenced at the facility on or about January 21, 2002.
18

19 29. Section 301 of the Act and the storm water regulations at 40 C.F.R. § 122.26 require
20 that a storm water permit be obtained for construction activity including clearing, grading and
21 excavation disturbing at least five acres or greater or disturbing less than five acres but is part of
22 a larger common plan of development.
23

24 30. At the time of the inspection, Respondents had not obtained the requisite permit.
25

26 31. Respondents’ failure to obtain a permit is in violation of the regulations and the Act.
27 33 U.S.C. § 1319, § 1342(p).
28

29 **PROPOSED CIVIL PENALTY**

30

31 32. The Act authorizes the assessment of a civil penalty of up to \$27, 500 per day, for
32 each violation of the Act. 33 U.S.C. § 1319(g). The Act requires EPA to take into account the
33 following factors in assessing a civil penalty: the nature, circumstances, extent and gravity of the
34 violation; Respondents’ prior compliance history of such violations; Respondents’ culpability for
35 the violation; any economic benefit or savings gained from the violation; and other factors that
36 justice may require.
37

38 33. In light of the statutory factors and the specific facts of this case, including the
39 number of months of violations, EPA proposes that a penalty of \$80,000 be assessed against
40 Respondents for the violations alleged above, as explained below:
41
42

Nature, Circumstances, Extent, and Gravity of Violations

Respondents have control of storm water management at the facility beginning January 21, 2002. The October 4, 2002 inspection by EPA found that Respondents relied on the Aurora Town Center's permit and SWMP. The Aurora Town Center's May 20, 2003 response to EPA's inspection report indicates that the Aurora Town Center ceased responsibility once the pad was completed. Therefore, Target construction activities did not have permit coverage after the "pad" was released to its new owner, Target Corporation.

By failing to obtain a permit, Respondents failed to implement the intent of the storm water regulations - to minimized sediment off the construction site. Respondents not only relied on the Aurora Town Center's permit coverage, it also relied on the Aurora Town Center's SWMP which did not contain all the required information as outlined in the permit. Further, the Aurora Town Center did not conduct the required storm water inspections as outlined in its SWMP nor did the Aurora Town Center implement the required BMPs (i.e., storm drain protection) in or around the Target construction site.

Prior Compliance History

This Complaint is the first enforcement actions EPA Region 8 has issued to Respondents requiring compliance with the applicable storm water regulations.

Degree of Culpability

Respondent (Roche Constructors, Inc.) was the general contractor at a construction site inspected by EPA in March 2002. The construction site was located in Loveland, CO and had permit coverage under COR-030000. Therefore, Respondent had knowledge of the storm water permit requirements, and should have been aware of all the requirements.

Economic Benefit

An economic benefit was experienced by Respondents for failure to obtain a storm water permit. Specifically, Respondents benefitted by not spending the required funds to obtain the required permit by January 21, 2002. Additional information may be collected in regard to this factor supporting a greater penalty adjustment.

Ability to Pay

EPA did not reduce the proposed penalty due to this factor, but will consider any new information Respondent may present regarding Respondent's ability to pay the penalty proposed in this Complaint.

Other Matters that Justice may Require

No adjustments made regarding these factors at this time.

34. As required by the Act, prior to the assessment of a civil penalty, EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter, and present evidence in the event a hearing is held. 33 U.S.C. § 1319(g)(4).

35. The ALJ is not bound by EPA's penalty policy or the penalty proposed by EPA, and may assess a penalty above the proposed amount, up to the \$27,500 per day per violation authorized in the statute.

To discuss settlement or ask any questions you may have about this case or process, please contact David J. Janik, Supervisory Enforcement Attorney, at 303-312-6917, or the address below:

United States Environmental Protection Agency
Region 8, Office of Enforcement, Compliance and
Environmental Justice, Complainant
999 18th Street, Suite 300 (ENF-L)
Denver, CO 80202

Date: 7/9/03

By: SIGNED
Carol Rushin
Assistant Regional Administrator

SIGNED
David J. Janik, Supervisory Enforcement Attorney
Legal Enforcement Program

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE
REGIONAL HEARING CLERK.**

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON JULY 11, 2003.